Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JOHN J. GARRICK AND MARYANN GARRICK,

Petitioners,

v.

DALE THIBODEAUX, ACADIA PARISH SHERIFF'S DEPARTMENT, JOHN WILSON, TOWN OF CHURCH POINT, KEN GOSS, Sheriff of Acadia Parish, LA, FLOYD LYONS, Chief of Police for the Town of Church Point, LA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should exclusion of the *nolo contendere* plea as required by Rule 410 of the Federal Rules Of Evidence be appropriately recognized, as decided by the Second Circuit in *Thomas v. Roach,* or should the policies supporting exclusion of the *nolo contendere* plea be eroded?

II. Should *Heck v. Humphrey* be followed in cases in which the § 1983 litigant is not "in custody" nor pursuing "habeas" remedies or should the breadth of § 1983 as originally intended be recognized?

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PETITION FOR WRIT OF CERTIORARI

John J. Garrick and Maryann Garrick ("Garricks") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on February 22, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is unpublished by order of the Fifth Circuit. It is reprinted in the Appendix at App. 1.

JURISDICTION

The Ruling of the United States Court of Appeal, Fifth Circuit, was entered on February 22, 1999. Rehearing was not sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. The statute under which the United States Supreme Court has jurisdiction is 28 U.S.C. § 1254(1), which provides as follows:

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

2. 28 U.S.C. § 1331, which provides:

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 42 U.S.C. § 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Rule 410 of the Federal Rules of Evidence, which provides:

Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the

defendant who made the plea or was a participant in the plea discussions:

. . .

(2) a plea of nolo contendere;

. . .

STATEMENT OF THE CASE

The Original Complaint in this matter was filed on August 9, 1996 naming various law enforcement officers and governmental entities of both the Parish of Acadia, in Louisiana, and the Town of Church Point, Louisiana as defendants. The complaint is an action under 42 U.S.C. §§ 1981, 1983, 1985 and 1988 in addition to pendent Louisiana state law. It alleges excessive force, and certain other violations of Petitioners' constitutional rights.

After issue was joined and all discovery completed Defendants below filed Motions for Summary Judgment and Alternatively, to Dismiss alleging no genuine issue of material fact and asserting the defense of qualified immunity. By Memorandum Ruling and Order dated February 20, 1998, the District Judge denied Defendants' Motions for Summary Judgment and Alternatively, to Dismiss.

After Petitioners filed a Motion in Limine seeking to exclude evidence relating to no contest pleas that had been entered, Defendants below then filed motions for summary judgment and for dismissal of Petitioners' actions based on the pleas of no contest, citing the analysis under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). On May 1, 1998, the trial judge

then issued her Memorandum Ruling and Order granting the motions for summary judgment and for dismissal, thereby dismissing Petitioners' claims. The Fifth Circuit Court of Appeal affirmed the district judge's ruling.

The relevant facts alleged by Petitioners are as follows:

Petitioner, John J. Garrick, has alleged that on August 14, 1995, as he was walking on the sidewalk with a friend in the Town of Church Point, Louisiana, an officer of the Town of Church Point Police Department, John Wilson, approached him and advised him he was under arrest. It is alleged that this was done without probable cause. Garrick's Complaint states that the officer then began to handcuff and manhandle him and ultimately slammed him against a nearby vehicle. Petitioner Garrick then was choked and beaten at various times by Detective Sergeant Dale Thibodeaux of the Acadia Parish Sheriff's Department. As alleged, he was ultimately violently shoved into the rear of a Suburban-type vehicle and brutally punched numerous times about the head, neck, chest and ribs, causing him to sustain broken ribs, severe facial swelling, and injuries to his neck and back.

Garrick was then taken to the police station where he was booked and charged with disturbing the peace, resisting arrest, battery on a police officer and remaining after being forbidden. Represented by other counsel, Garrick entered pleas of no contest to all four charges and ultimately filed this action.

Existence of Jurisdiction Below

Petitioners brought this civil rights action in the United States District Court for the Western District of Louisiana, exercising jurisdiction pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With The Second Circuit's Ruling In *Thomas v. Roach* And Is Contrary To Rule 410 Of The Federal Rules Of Evidence And The Congressional Intent Supporting The Rule

The decision below is in direct conflict with the Second Circuit's decision in *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999). The Second Circuit held that a litigant's § 1983 action "predicated on excessive force during his arrest is not barred by his *nolo contendere* plea to the offense for which he was arrested." *Id.*, at 144.

Rule 410 of the Federal Rules of Evidence clearly provides that a plea of *nolo contendere* "is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions. . . . " The Fifth Circuit has previously stated that "[e]vidence of a *nolo* plea is inadmissible." *United States v. Manzella*, 782 F.2d 533, 546 (5th Cir. 1986). In a case in which evidence of a *nolo* plea was sought to be admitted for purposes of obtaining a summary judgment, as in the case at bar, Judge Porteous of the Eastern Disrict of Louisiana wrote "[t]his Court will not allow the nolo contendere plea to be used as evidence for the summary

judgment based on the exclusion set forth in FRE 410." *First Nat. Bank v. First Financial of La.*, 921 F.Supp. 1506, 1508 (E.D.La. 1996).

A careful analysis of the legislative history of Rule 410 reveals that its purpose was to encourage plea bargaining. The guilty plea has long been recognized as a crucial aspect of the criminal justice system in the United States.

> Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543. 'Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.' See also *People v. Hamilton*, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Advisory Committee's Note to the Supreme Court, Advisory Committee on Criminal Rules, U.S. Judicial Conference. The United States Supreme Court stated in *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), that

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to

> a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

See also *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 736 (1977). "Even before the enactment of Fed.R.Crim.P. 11(e)(6) and Fed.R.Evid. 410, this Court 'recogniz[ed] the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him.' " *United States v. Robertson*, 582 F.2d 1356, 1365 (1978) (quoting *United States v. Herman*, 544 F.2d at 796, citing *United States v. Ross*, 493 F.2d 771, 775 (5th Cir. 1974)).

The trial judge ruled that Petitioners' 1983 claims were "preempted under the auspices of *Heck*." Memorandum Ruling and Order, Appendix at App. 4. Of paramount concern to the Court in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), was the ability on the part of a civil rights litigant to collaterally attack a previous criminal judgment. The Supreme Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Id., at 486-87.

The issue presented here is whether Rule 410 of the Federal Rules of Evidence precludes the admission of a *nolo contendere* plea so that a *Heck* determination is pretermitted. To find that the § 1983 claim is not cognizable, the Court must consider the underlying criminal conviction. Rule 410 concerning the inadmissibility of no contest pleas expressly disallows any consideration of the underlying criminal disposition when it results in a *nolo contendere* plea. Rule 410(2), Federal Rules of Evidence.

No persuasive arguments have been presented to suggest that Rule 410 should apply in all cases but not those under *Heck*. The underlying policy considerations, legislatively enacted, behind Rule 410 of the Federal Rules of Evidence are as applicable to a civil rights action under 42 U.S.C. § 1983 as they are in other cases in which the no contest plea has been excluded.

Respondents have asserted that Rule 410 stands for the proposition that the plea would only be excluded if the criminal defendant making the plea is also a defendant in the civil proceeding. They cite *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988). Specifically treating the analysis in *Walker, supra,* Weinstein suggested that "this is a strained reading of the Rule, and there is no reason in policy or logic for such a distinction." Weinstein's Federal Evidence, § 410.06[3]. The word "defendant" in the Rule obviously refers to the status of the litigant in the underlying criminal proceeding and not his status in the civil proceeding. The clauses "who made the plea" and "who . . . was a participant in the plea discussions" clearly modify the word "defendant" and must therefore be referring to the litigant's status in the prior criminal

proceeding insofar as the subsequent plaintiff or defendant is not making a plea or participating in plea discussions. The civil litigant is simply suing or being sued. See also *Williams v. Regional Transit Authority*, 546 So.2d 150 (La. 1989) (" . . . the nolo contendere plea, is not detrimental to plaintiff, because such a plea does not constitute evidence of guilt in a civil proceeding").

Additionally, in treating the related issue of court-made preclusion rules, the Majority Court in *Heck* stated that "in developing them the courts can, and indeed should, be guided by the federal policies reflected in congressional enactments." *Heck, supra,* at 488-89, Note 9. The Court there grappled with the court-made common law principles regarding collateral attacks, finality and consistency juxtaposed against the purposes behind § 1983. The instant case juxtaposes the considerations for finality and consistency addressed in *Heck* against the legislative and well-documented policy and history of Rule 410. This Court should therefore carefully consider the congressional will behind Rule 410 in interpreting *Heck's* application to the facts presented here. It should be guided by Congress' special concerns for protecting the sanctity of the plea and encouraging negotiations to promote efficiency in the criminal justice system.

Simply stated, the decisions of the Second and Fifth Circuits create conflicts on identical facts. In *Thomas* the no contest plea was not admissible; in the case at bar, it was. The conflict in the Circuits is clear and irreconcilable. Certiorari is appropriate.

II. The Fifth Circuit's Opinion Denying A § 1983 Claim By An Individual Not In Custody, Interpreting *Heck v. Humphrey*, Involves An Important Question Of Federal Law That Has Not, But Should Be, Settled By This Court In Favor Of The Viability Of The § 1983 Claim

The Majority Court's opinion in *Heck* arguably can be interpreted to include a favorable termination requirement as an element of all § 1983 actions. The specific issue of whether an individual, such as Petitioner herein, who has not been imprisoned but merely fined, can pursue his civil rights action, has not yet been squarely addressed by this Court. This is an important federal question involving the civil rights laws of the United States and should be resolved by the Court.

The situation presented here clearly does not implicate the federal habeas statute and therefore does not lie at its cross-roads with § 1983. Petitioner is not challenging the constitutionality of his confinement and thus is not attempting to assert any rights afforded by the federal habeas corpus statute.

As succinctly stated in *Heck*, "congressional policy as reflected in enacted statutes must ultimately be the guide." *Supra*, at 503 (Souter, J., concurring in judgment). We are not here dealing with competing congressional policy considerations as in *Heck*. The instant facts present to the Court for its consideration the issue of the malicious prosecution favorable termination requirement, as established by the common law, juxtaposed against the clear legislative intent evident in the enactment of § 1983.

To impose on civil rights litigants the burden of proving favorable termination of the underlying charge, conviction or sentence is to add an element to the § 1983 claim which Congress did not choose to add. This arguably would have a serious chilling effect on the § 1983 claim and may frustrate the will of Congress. Quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), Justice Souter, concurring in judgment, *Heck, supra*, at 501, stated that " '[t]he very purpose of' § 1983" is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." A favorable termination requirement unjustifiably limits the "broad reach" of § 1983. As expressed by Justice Ginsburg, "[i]ndividuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach' ". *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 990, 140 L.Ed.2d 43 (1998) (Ginsburg, J., concurring in judgment).

Certiorari is therefore appropriate to resolve this important federal question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30506
Summary Calendar

JOHN J. GARRICK and MARYANN GARRICK,

Plaintiffs-Appellants,

versus

DALE THIBODEAUX; SHERIFF'S DEPARTMENT ACADIA PARISH; JOHN WILSON; TOWN OF CHURCH POINT; KEN GOSS, and FLOYD LYONS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 96-CV-1894

(Filed Feb. 22, 1999)

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

John and Maryann Garrick appeal the summary judgment in favor of all defendants on their 42 U.S.C. § 1983 claims. In ruling on a summary-judgment motion, a court must review the facts drawing all inferences most favorable to the party opposing the motion. *See Newell v. Oxford Management, Inc.*, 912 F.2d 793, 795 (5th Cir. 1990). The district court held that under the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 486 (1994), Garrick was precluded from raising his § 1983 claims. Under *Heck*, a § 1983 plaintiff cannot recover damages for an unconstitutional conviction or for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid," until he has shown that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486-487. Otherwise, such a claim for damages is not cognizable under § 1983 and must be dismissed. *Id.* at 484-486; *see Stephenson v. Reno*, 28 P.3d 26, 27 (5th Cir. 1994).

John Garrick had been convicted on his plea of *nolo contendere* of remaining after being forbidden, disturbing the peace, resisting arrest, and battery on a police officer. No evidence or allegation of a reversal or dismissal of the convictions is in the record. The allegations against the defendants under § 1983 include assault, battery, unlawful arrest, racial discrimination, and excessive and unjustified force. These allegations would directly call into question the validity of the convictions for resisting arrest and battery of a police officer. Therefore, even after

all inferences most favorable to the plaintiffs are considered, the defendants have carried their burden of showing that Garrick's claims are barred under *Heck*, and the Garricks have failed to produce evidence raising a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). The summary judgment granted by the district court is therefore AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

JOHN J. GARRICK, ET UX	CIVIL ACTION NUMBER: 96-1894
VERSUS	JUDGE DOHERTY
DALE THIBODEAUX	MAGISTRATE JUDGE TYNES

MEMORANDUM RULING

(Filed May 01, 1998)

This matter comes before the Court on a renewed Motion for Summary Judgment filed on behalf of Sheriff Kenneth Goss, Deputy Dale Thibodeaux, the Acadia Parish Sheriff's Department, Floyd Lyons', individually and in his official capacity as Chief of Police of Church, Point, Louisiana, John Wilson and the Town of Church Point ("Defendants"), seeking to dismiss plaintiff's claims pursuant to 42 U.S.C. § 1983 on the basis that said claims are barred by the United States Supreme Court ruling in *Heck v. Humphrey*, 512 U.S. 477, 486, 114 S.Ct. 2364, 2372, 129, L. Ed. 2d 383 (1994), which held that a § 1983 claim that effectively attacks the constitutionality of a conviction does not accrue until that conviction has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.*; *see also Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996).

This Court previously denied defendant's Motion for Summary Judgment in a ruling dated February 20, 1998,

finding that a genuine issue of material fact existed as to preclude a granting of defendant's motion. Subsequent to this Court's February 20, 1998 ruling, plaintiff filed a Motion in Limine urging the Court to exclude any evidence of the plea of *nolo contendere* (or no contest) by John J. Garrick on the charges lodged against him which included resisting arrest and battery on a police officer. Plaintiff urged the exclusion of the plea on the basis of Federal Rule of Evidence 410(2) which prohibits any evidence of a criminal conviction in a subsequent civil suit against the defendant for the same act, i.e., that plaintiff in this case would be a defendant in a civil suit which encompasses the same criminal action for which he has pled no contest.

This Court subsequently issued a Memorandum Ruling on March 16, 1998, in the case entitled, "Richard D. Hanks, Sr. vs. Parish of Acadia, et al," CV96-2400. In said action, this Court dismissed plaintiff's claim pursuant to 42 U.S.C. § 1983 for excessive force on the basis that said claim was barred pursuant to *Heck, supra*. Defendants thereby upon receipt of the *Hanks* opinion, re-urged their Motion for Summary Judgment and sought dismissal of this action based upon the plaintiff's, John J. Garrick's, plea of "no contest" to the charges of disturbing the peace, remaining after being forbidden, resisting arrest, and battery of a police officer.

This Court held a telephone status conference with counsel and sought additional briefing, especially on the issue of the plea of no contest under Louisiana law, and the application of Federal Rule of Evidence 410(2) as contrasted by the United States Supreme Court ruling in

Heck. After review of the additional memoranda submitted by both parties, this Court rules as follows and will GRANT defendants' Motion to Dismiss plaintiff's claims pursuant to 42 U.S.C. § 1983.

This Court now ADOPTS its reasoning contained in the Memorandum Ruling entitled, "Richard D. Hanks vs. Parish of Acadia, et al," CV96-2400, issued March 16, 1998. The undisputed facts of this litigation are that John Garrick was placed under arrest on August 14, 1995, by Officer John Wilson of the Church Point Police Department. Plaintiff was charged with remaining after being forbidden, disturbing the peace, resisting arrest and battery on a police officer. Garrick pleaded no contest on all charges, was convicted on all charges, and paid a $200.00 fine. The pleas of no contest were entered on August 21, 1995 and the $200.00 fine was paid on September 29, 1995. Defendants' Exhibit A, pleas of no contest.

Under Louisiana law, a plea of *nolo contendere* or "no contest" is "equivalent to an admission of guilt and, with the exception of being unavailable as an admission in a civil trial, is treated as a guilty plea." *State v. Cook*, 664 So.2d 489 (La. App. 3d Cir. 1995), *rev'd on other grounds* at 674 So.2d 957, and *State v. Brown*, 490 So.2d 601 (La. App. 2d Cir. 1986).

Therefore, plaintiff's conviction has not been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 114 S.Ct. 2364, 2372; *see also Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996).

Accordingly, plaintiff's claims for excessive force pursuant to 42 U.S.C. § 1983 are hereby preempted under the auspices of *Heck*.

This Court need not reach plaintiff's argument pursuant to Federal Rule of Evidence 410(2), as previously stated, § 410(2) would not apply in a § 1983 litigation where the defendant in a criminal proceeding is now proceeding as a plaintiff in a civil suit. Both Louisiana Code of Criminal Procedure article 552 and Federal Rule of Evidence article 410(2) apply to a defendant in a civil suit brought as a result of a criminal conviction.

THUS DONE AND SIGNED this 30th day of April, 1998.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

JOHN J. GARRICK, ET UX	CIVIL ACTION NUMBER: 96-1894
VERSUS	JUDGE DOHERTY
DALE THIBODEAUX	MAGISTRATE JUDGE TYNES

ORDER

(Filed May 01, 1998)

Considering the foregoing Memorandum Ruling:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment [Doc. #50] filed on behalf of Sheriff Kenneth Goss, Deputy Dale Thibodeaux, the Acadiana [sic] Parish Sheriff's Department, Floyd Lyons', individually and in his official capacity as Chief of Police of Church, Point, Louisiana, John Wilson and the Town of Church Point ("Defendants"), seeking to dismiss plaintiff's claims pursuant to 42 U.S.C. § 1983 on the basis that said claims are barred by the United States Supreme Court ruling in *Heck v. Humphrey*, 512 U.S. 477, 486, 114 S.Ct. 2364, 2372, 129, L. Ed. 2d 383 (1994) is GRANTED. All other motions, i.e., Documents Nos. 39 and 47 are hereby DENIED as MOOT.

Lafayette, Louisiana this 30th day of April, 1998.

JUDGMENT ENTERED
May 4, 1998
BY Donna M. Norfleet
COPY TO Cormier
Barousse
Wimberley

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE